

Who's Right?

Australia's signing of the United Nations Declaration on the rights of Indigenous and tribal peoples



Candidate Number: 8036

Supervisor: Gro Birgit Ween

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“[What we gave Aboriginal people in the towns we visited was hope (...) We stirred their imagination, their desire for human rights.]”

1965, speech by Charles Perkins on the Australian Freedom Rides



European Network for Indigenous Australian Rights, Aboriginal Tent embassy
outside old parliament house in Canberra, (2000)

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Students involved in the demonstration against discrimination of Aboriginal people in Walgett, NSW, 1967. Photograph reproduced with permission of Wendy Watson-Ekstein (nee Golding) and supplied by Ann Curthoys.

Ann Curthys, Australia Freedom ride, 1965

ABSTRACT

The over-representation of Indigenous people around the world is an issue, which many still endure today. Indigenous health, well being and dignity is often over looked by the terms of contracts in which states have with their stakeholders, leading to displacement and shorter lives , than there non-indigenous citizens.

The United Nations Declaration on the Rights of Indigenous and Tribal Peoples was launched on September 2007 and described by the UN as a landmark decision for Indigenous and tribal peoples worldwide. This comes after continuous exclusion of Indigenous people from the United Nations, and the enduring affects of colonization. On April 3rd 2009, The Australian Government adopted the article, reversing it's previous stance. The declaration is heavily embedded in mechanisms, which promote Human Rights in relation to self-determination, the preservation of cultural heritage and land rights. This thesis will explore the rights outlined in the UNDRIP and specific issues relating to the empowerment of Indigenous Australian. I match this against Australia's current obligations under international law and consider how the UNDRIP can offer empowerment for Indigenous Australians.

ABBREVIATIONS

UNDRIP	United Nations Declaration on the rights of Indigenous and tribal
ILO	International Labor Organization
ILO 169	ILO Convention 169 on Indigenous and Tribal Peoples,
ICCPR	International Covenant on Civil and Political Rights, 1966
ICESCR	International Covenant on Economic, Social and Cultural Rights, 1966
UDHR	Universal Declaration on Human Rights, 1948
ICERD	International Covenant on the Elimination of all forms of Racial Discrimination, 1966
HRC	Human Rights Committee
UNESCO	United Nations, Educational, Scientific and cultural Organization
RCIADIC	The Royal Commission into Aboriginal deaths in Custody

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1 INTRODUCTION: AUSTRALIA'S OWN FREEDOM RIDE

Australia, a land famous for the slogan G'day mate. It's sunny beaches stretching miles around the east and west coast, the famous Bondi Beach, koala, kangaroo and Opera house, this is the Australia most of us are familiar with. But behind this romanticized version, there is a history, a history, which needs to be understood, one which involves the Indigenous people of Australia. I start this thesis with a piece of Australia's history, one that involves the fight for civil rights...

Inspired by The African-American Civil Rights Movement (1955–1968), a group of University Students from the Student Action for Aborigines (SAFA) organized a bus tour to expose segregation and racial discrimination within western and coastal New South Wales towns.¹ The demonstration captured both domestic and international attention within the media and exposed an entrenched racism within Australia. The President of the SAFA was Charles Perkins, an Arrernte man born in Alice Springs. As an Aboriginal man himself, Perkins was determined to raise awareness of segregation practices in Australia, which routinely barred Aboriginal people from membership and entry into clubs, swimming pools and cafes.² Despite hostile reactions from the locals, the demonstration raised awareness of the appalling conditions in which indigenous Australians lived, and set precedent for Indigenous empowerment and indigenous Human Rights in Australia.³

In summing up his experience, and those of his fellow students, he said;⁴

"What we gave Aboriginal people in the towns we visited was hope. We stirred their imagination, their desire for human rights."⁵

¹ Short, D. Reconciliation assimilation, and the Indigenous peoples of Australia, *International Political Science review* (2003), vol 24, No. 4, pp, 493.

² Chesterman, J (2001) Defending Australia's reputation: How Indigenous Australians won civil rights (Part 1). *Australian Historical Studies*, v.32 no.116, p.20-39.

³ Chesterman, J (2001) Defending Australia's reputation: How Indigenous Australians won civil rights (Part 1). *Australian Historical Studies*, v.32 no.116, p.20-39.

⁴ Short, D. Reconciliation assimilation, and the Indigenous peoples of Australia, *International Political Science review* (2003), vol 24, No. 4, pp, 493.

I tell the story of the freedom rides in order to illustrate how the actions of Perkins and others, influenced the color scheme of service delivery within Aboriginal policy making.⁶, When the principle of human dignity and worth that was ignored in Australia. It is for this reason I am writing about the Indigenous people of Australia.

Growing up in Urban Australia has also influenced my decision to write about indigenous Australians because I to, witnessed first hand, the discrimination and torment Aboriginal people come up against in everyday life.

For a short part of my life I attended schooling in New Zealand and learnt the importance of the Maori culture and our language. When I moved to Australia the only information I was given in reference to aboriginal people, were the pessimistic stereotypes portrayed in the media, and the racist name calling and teasing of Aboriginal children in the schoolyard. From this experience, I have been motivated to learn the beauty of their culture. It is also my heritage as a native Maori that helps me to understand how important it is for us, as indigenous people to have our culture protected, understood and respected. I am a Maori something that I bought with me when I entered this world. A large majority of my Maori relatives are what one may classify as “urbanized” Maoris, despite this, they to identify themselves as being Maori. As a Maori I don’t identify myself as such because of definition given by the United Nations, I am a Maori because of the stories of my ancestors that have created who I am today, the connection my mother has with her land, the tears of happiness, that come to my eyes when I see my brothers doing the Hakka, the anger I feel when I see our sacred art of carving being used in modern pop-culture and commercial marketing, and the misery I feel when my mother urges us to build on her land to stop the white man from taking over. This is why I write about the UNDRIP, because it applies to me and my future generations and my friends who are indigenous Australians.

As countries across the world seek to reform their social security systems, in Australia the indigenous people are still disproportionately represented among welfare recipients and

⁵ Perkins, C, (1965) Australian Freedom ride speech, <http://www.freedomride.net/spark.html>

⁶ Brigg, M, Murphy, L. The sad predictability of Indigenous Affairs, UQ e-space credentials, Forthcoming article in Arena Magazine, August 15th 2007p 1

people in poverty.⁷ Over the past 30 years, Australian Indigenous affairs have received substantial government funding and assistance.⁸ Funding which has led to major administration reforms in an effort to redress social and economic disparities between indigenous and non-indigenous Australians.⁹

The daily experience and persecution in which Indigenous Australians have experienced, is an embarrassment.¹⁰ A quick glance at statistics of indigenous infant and maternal mortality, Indigenous morbidity rates,¹¹ educational achievement by Aboriginal Islander Children services like water and sewerage disposal in Indigenous communities and of the over-representation of Indigenous people in the criminal justice system is evidence of Australia's failure to recognize the daily struggle Indigenous Australians persevere with.¹²

In his formal speech to parliament, to formally apologize to the stolen generations, Rudd spoke about, "closing the gap that lies between indigenous and non-indigenous Australians."¹³ Is the adoption of the UNDRIP, part of his strategy to "close this gap? Or are indigenous people still in position, where they are still "requesting the permission of the station master?"¹⁴ Kevin Rudd still stands by his commitment to support the controversial Northern Territory National Emergency Response, even after his speech and plans to "close the gap". This will be analyzed further in my thesis.

⁷ Daly, A. Smith, D. Reforming Indigenous Welfare Policy: salutary lessons from The US experience. *Economic Papers*, vol.22 no.4, December 2003 p. 28

⁸ Murphy, Who's Afraid of the Dark? Australia's Administration in Aboriginal Affairs, dissertation to the Centre for Public Administration, University of Queensland 2000. p4

⁹ Murphy, Who's Afraid of the Dark? Australia's Administration in Aboriginal Affairs, dissertation to the Centre for Public Administration, University of Queensland 2000, p4.

¹⁰ Dodson, P, The way forward. *Eureka Street*, v.7 no.10 December p 57

¹¹ SEE ANNEX, 6.2 FAIR OR POOR SELF-ASSESSED HEALTH, BY INDIGENOUS STATUS 2004-2005
SEE ANNEX 6.2.1 NUMBER OF LONG-TERM HEALTH CONDITIONS, INDIGENOUS PERSONS, 2004-2005

¹² Dodson, P, The way forward. *Eureka Street*, v.7 no.10 December 1997, p 57

¹³ Kevin Rudd: Address at the apology to the Forgotten Australians and former child migrants Great Hall, Parliament House, 2007. Retrieved, May 3rd 2010 from, <http://www.theaustralian.com.au/news/nation/full-transcript-of-pms-speech/story-e6frg6nf-111115543192>

¹⁴ Dodson, P. Brennan, F. (1997) The way forward. *Eureka Street*, v.7 no.pp.26-32.

When taking into consideration the rights of Indigenous peoples under international law, it is necessary to understand the framework in which these rights work, and whose language is being used and whether the laws that have been advocated for the aspiration of Indigenous people offer empowerment.¹⁵

At a national level aboriginal people such as Mundine and Pearson, have stepped in as “representatives” for Aboriginal people. Mundine was chosen as the “audible” member of the National Indigenous Council, offering advice to the Howard Government on the future of Indigenous Affairs, but later stated that the party would not focus on Indigenous Affairs or human rights issues, arguing;

“They are not the central issues; no one is going to win elections on that stuff.”¹⁶

These comments raise question over the people chosen by government to represent Indigenous Australians. In his article “indigenous happenings up top”, Jull questions the use of aboriginality to legitimize public policy

(...) “If he has been chosen to deny aboriginality as a meaningful cultural, social and political fact, was the choosing of a Blackman really worth while (...)?”¹⁷

Whilst the involvement of Indigenous people in policy making is a right move, one should not get carried away. Similar hope was perceived in Native title, but now it offers little to those who claim it.¹⁸ Mansell, on his argument in relation to native title said,

“ While governments are prepared to tolerate aboriginal use and connection with an area, and when that tolerance is exhausted, the aboriginal groups are left to a token amount of compensation.”¹⁹

¹⁵ Brigg et al. 2007, p.1, The Sad predictability of Indigenous Affairs, UQ e-space credentials, Forthcoming article in Arena Magazine, August 15th 2007 p.1...

¹⁶ Jull, P. Indigenous unhappenings at the top: Warren Mundine’s national Indigenous Council. *Arena Magazine*, no.81, February-March 2006 p.52.

¹⁷ Jull, P. Indigenous unhappenings at the top: Warren Mundine’s national Indigenous Council. *Arena Magazine*, no.81, February-March 2006 p.52.

¹⁸ Mansell, M (1994) Towards Aboriginal Sovereignty: Aboriginal provisional Government, Social Alternatives, April 1994, Vol. 13 No. 1 at pp 82.

¹⁹ Mansell, M (1994) Towards Aboriginal Sovereignty: Aboriginal provisional Government, Social Alternatives, April 1994, Vol. 13 No. 1 at pp 82.

Aboriginal people such as Noel Pearson, who are mediators of these models, then impose the rhetorical assumptions and definitions of government upon Aboriginal communities.²⁰ An example of this is the recent introduction of the, Hope Vale GuuGu Yimithir Warra Foundation for Welfare reform, which has been agreed upon by Indigenous affairs minister Mal Brough and Aboriginal people such as Noel Pearson.

The intention of these models is to process Aboriginal people through the application and operation of mainstream and administrative institutions.²¹ By including indigenous people within Australian policymaking, Government bodies are able to legitimise their practices, “The reality of these impositions is that they polarize the Aboriginal community to ensure easier access for Government and their agents to manage Aboriginal issues.”²²

Communities are forced to conform to higher bodies and engage in practices which are not related to traditional Aboriginal culture. Instead we as indigenous people are seen as obstacles to the progress of civilization, wards of the state defined and given meaning under an inherited label. Under the banner of the United Nations, are Aboriginal people, given form and meaning within mechanisms and policies promoting democracy?²³ This is a question, which will be discussed in more depth within this thesis.

This paper will analyze Australia’s signing of the UDRIP and the various provisions, which make mention to culture, land and autonomy. In order to put Australia’s position into perspective, I begin with a descriptive analysis of the treatment and history of aboriginal Australia's. An analysis which starts from the point of colonization, to protection policy, human rights and then finally Australia's signing of the UNDRIP.

Secondly, I look at the current covenants and laws which are implemented in Australia and evaluate the meaning of these In relation to culture, land and autonomy.

I then look at the various arguments Australia put forward to the General Assembly, before signing the UNDRIP and consider these arguments with the practicalities of implementing the

²⁰ Pearson, N. (2002), On the human right to misery, mass incarceration and early death. *Arena Magazine*, 56 December 2002, p22-31

²¹ Murphy, L. (2000) Who’s Afraid of the Dark? Australia’s Administration in Aboriginal Affairs, dissertation to the Centre for Public Administration, University of Queensland, p7.

²² Murphy, L. (2000) Who’s Afraid of the Dark? Australia’s Administration in Aboriginal Affairs, dissertation to the Centre for Public Administration, University of Queensland, p.8.

²³ Batty, 2005, p212

UNDRIP at a national level, and make conclusions on the principles of the UNDRIP, which offer empowerment for Indigenous Australians .

1.1 Research Topic

In her address to the General Assembly in 2007, Victoria Tauli-Corpuz, chairman of the United Nations Permanent Forum on Indigenous Issues, said: “This day will forever be etched in our memories as a significant gain in our peoples long struggle for our rights as distinct peoples and cultures.”²⁴ The UNDRIP is said to be a groundbreaking achievement for indigenous peoples worldwide. With Australia reversing its first decision from one of opposition, to adoption in 2009. Will this latest adoption lead to empowerment for indigenous people? Or will Australia's reputation still be tarnished by its past treatment of Aboriginal people. This is a question I attempt to answer in my thesis.

1.2 Problem Statement

THE UNDRIP like the ILO convention 169, is a unique instrument for a number of reasons. Firstly, because of the close co-operation of its beneficiaries, secondly its implementation mechanisms, thirdly it contains both individual and collective rights, and goes further in its provisions to, land, autonomy and culture.²⁵

This thesis seeks to analyze, to what extent the adoption of the UNDRIP in Australia offers empowerment for indigenous Australians. I will also outline this argument in relation to current treaties Australia is signatory to.

In analyzing the UNDRIP, I do this from general terms, but more specifically general terms which are related to indigenous empowerment. I focus this thesis around three general terms of empowerment these being, land culture and autonomy. I argue that the discussion of land has been a topic of particular concern for the Australian Government, due to the cultural

²⁴ Speech made by Victoria Tauli-Corpuz: GA/10612 (2007), General Assembly adopts declaration on rights of Indigenous peoples; “Major step forward” Towards Human Rights for all, says president, 107th & 108th meetings, retrieved and accessed January 16th 2010, from: <http://www.un.org/News/Press/docs/2007/ga10612.doc.htm>.

²⁵ Donders, (2002), Towards a Right to Cultural Identity, School of Human Rights Research, Intersentia, p217

connection in which Indigenous people have to the land and Australia's balancing of economic stakeholders i.e. mining corporations.

1.2.1 Method

The Approach I have taken in this thesis is multidisciplinary, sourcing my argument from a perspective of international law and social science. The primary course I will use in my arguments are the UNDRIP and a wide source of secondary literature which include, academic literature, Internet webpage's, news paper articles and UN documents.

The legal instruments I use are based on one of soft law and hard law. From the perspective of soft law I base my argument around the UNDRIP and similar declarations such as the UN charter and documents of international law. I use hard law in the form of case studies from Australia and the HRC, which include (but are not limited to), ICCPR and ICESCR, and Native title.

1.3 Research design

The main tool for analysis in this thesis is empowerment. Under colonization many Indigenous people world wide have been stripped of their empowerment and forced to become part of an alienated system.²⁶ From an indigenous perspective, Alfred defines empowerment as; “The reconstructing of a power base for the assertion of control over native land and life.”²⁷

To start this thesis, I begin with an overview of Australia's history and the treatment of it's Indigenous people. Within this overview I include the current position of indigenous people under common law and connect this analysis with case studies, such as the stolen generations.

²⁶ Thomas, Cora. (2001), From ‘Australian Aborigines’ to ‘White Australians’. *Australian Aboriginal Studies*, pp.21-35.

²⁷ Alfred: T (1999) *Peace Power and Riotousness: An indigenous Manifesto*, Oxford, Ontario Canada, p 76

In chapter 2, I examine Australia's position in relation to International Law and the HRC. This is followed by a description of the various international treaties in which Australia is obliged to follow under international law.

In chapter 3, I take a glance at the international framework, which is used for the protection of Indigenous peoples. I start with an historic overview, which is then followed by the current stance of the UN in relation to human rights and Indigenous people and the development of the UNDRIP.

Chapter 4, then goes on to describe the UNDRIP; it's development and the history of the adoption in Australia, under both domestic and International Law.

Finally, the conclusion of my thesis gives an overview of my findings based on the research. It is here that I ask my research question again and give further suggestion for the empowerment of indigenous Australians in relation to the UNDRIP.

1.3.1 Research Question

Can the UNDRIP offer a pathway toward empowerment for Indigenous Australians?

1.3.2 Sub Question 1

How is the language of the UNDRIP used in Australia?

1.3.3 Sub Question 2

How does the UNDRIP differ from the ILO Convention 169 on Indigenous and tribal peoples, in regard to specific issues relating to, land, culture and autonomy?

1.3.4 Legal Sources

Since the development of the United Nations Charter 1945, the United Nations have promoted and monitored fundamental human rights.²⁸ For the purpose of this thesis I use international legal instruments and case studies to clarify the Rights Based Approach and Australia's position in delivering human rights to Indigenous Australians.

From an international perspective, I primarily focus on the UNDRIP and the ILO 169. I then use instruments such as the ICCPR, and CESCR in consideration with judicial decisions brought before the Human Rights Committee and Australia's treatment of Indigenous people. As Australia is not belonging to any regional legal system traditionally, I draw my arguments around the binding treaties in which Australia is signatory under International law.

At a domestic level I focus on Australia's signing of the UNDRIP and how this fits within the framework of Australia's sovereignty and its implementation, in particular, those relating to culture, land and autonomy of Aboriginal Australians.

2 CHAPTER TWO: PUTTING AUSTRALIA'S HISTORY INTO PERSPECTIVE

For a number of reasons Australians retain a very small understanding of Aboriginal culture and of the civil rights of Indigenous people.²⁹ These perceptions and attitudes, continue to engineer, construct, program peoples perceptions that the only credible, valuable indigenous person who should be accepted in modern contemporary society are those people, who walk, talk, live, and maintain the "all Australian way of life."³⁰ Aboriginal people are instead, categorized as being the primitive other, under the assertion and superiority of the wider Australian identity.³¹ An ill-informed understanding, which ignores the richness; meaning, connection, and unique understanding Aboriginal Australians have toward country. This is the sad reality of a nation that continues to overlook the darker parts of its history. Even the

²⁸ Smith, R. (2007), *International Human Rights*, Online Resource Centre, 3rd Ed, Oxford p 25

²⁹ Taking civil rights seriously. *Australian Journal of Politics and History*, v.46 no.4, 2000 p.497

³⁰ Burns, M. (1995) "Cultural Fluidity" an interview with Noel Blomeley, unpublished interview transcript, Lismore NSW, Griffith University study and reading guide materials, 1995, p. 32.

³¹ Murphy, L. (2000) *Who's Afraid of the Dark? Australia's Administration in Aboriginal Affairs*, dissertation to the Centre for Public Administration, University of Queensland, p. 28.

acquisition of civil rights in relation Indigenous people is, for a variety of reasons, a surprisingly little understood aspect of Australian History.³²

This chapter explores the colonization of Australia in 1788 and the beginning of assimilation policy. In the course of this chapter I will focus on both past and present policy and explore why Aboriginal Australians find themselves in a vulnerable situation today. I use the case of the stolen generations as an example of assimilation process and the strategy used by government to include Aboriginal people in an all-Australian context.

I mention the stolen generations, as it illustrates the perception Europeans have on Indigenous culture and land. A theory described by Parekh as “liberal imperialism”.³³ A thought of liberal political theory where western powers, apply the knowledge of their sciences to the “natives” who are then seen as primitive or uncivilized under colonial rule”³⁴ An understanding that ignores the richness and importance of culture. Instead we are seen as the natives under the definition we inherited from the west. Buchan describes this as being the imperial attitude towards indigenous people;

“ An image that imperial and post-imperial authorities have helped to foster (...) and one which has a prominent place in British and Western political thought.”

It is this definition and theory of imperialism, which appropriated such protection laws, laws that lead to the total control and institutionalization of indigenous Australians and misunderstanding of culture. “A system which makes decisions for others (...) where in the colonizers are illegitimately privileged, and the colonizers are illegitimately devalued.”³⁵ “

2.1 Invasion and the defining of Aborigine

³² Chesterman, J. Defending Australia’s reputation: How Indigenous Australians won civil rights (Part 1). *Australian Historical Studies*, v.32 no.116, April 2001 p. 20

³³ Parekh, B. (2002), *Liberal Imperialism, Natives, Muslims, and others: Rethinking Multiculturalism: Cultural Diversity and Political Theory*, political theory, vol. 30, No.5, p739

³⁴ Anthropology, etc...talk more about the sciences included in this argument and why they can be included.

³⁵ Paine, R. “The path of welfare colonialism.” In *The White Artic: Anthropology Essays on Tutelage and Ethnicity*, ed. Robert Paine. Toronto University Press, p 3.

The Indigenous people of Australia, more commonly known as Aboriginal Australians, have a unique history which dates back some, 100,000 years plus.³⁶ They lived in a wide range of environments across mainland Australia and its surrounding Islands.³⁷ Their culture, traditions and language vary depending on their geographical location and group. Identities and cultural norms still differ today, but colonialism, Christianity and essential similarities within, have drawn different groups together.³⁸ Like other cultures, they engaged in a great deal of trade, inter-marrying, sharing of thoughts, ideas and song and dance.³⁹ They have different clan groups, which consisted of social bonds unfamiliar to the European culture. Pre-invasion Aboriginal community was localized, based on ties to traditional lands and clan groups, each with their own language laws and territorial boundaries.⁴⁰ The traditional lifestyles and cultural practices in which they adapted depended highly on the land on which they lived, and the tribal significance to the particular area.

On January 26 1788, things changed significantly when the first fleet arrived on *Gamaraigal* land.⁴¹ Before British arrival it is estimated that the indigenous population stood between 300,000 to one million, with up to 500 different regional groups.⁴² Within a short amount of time the British made attempts to destroy a lifestyle, which had been active for thousands of years.⁴³ Declaring the land vacant under the terms of *terra nullius*, ignoring any signs of Aboriginal culture and declaring the new found colony Australia under the British Crown.

Despite the obvious culture differences, European settlers saw Australia as a land for settlement. One side respected the land; one side exploited.⁴⁴ One side was peaceful and

³⁶ Falk, Philip. "Indigenous Australian Peoples and the law, Course Materials, 2007, Book 1 of 2, Griffith Law School, Griffith University, p.2.

³⁷ Falk, Philip. "Indigenous Australian Peoples and the law, Course Materials, 2007, Book 1 of 2, Griffith Law School, Griffith University, p.2.

³⁸ Close, S. R-Imagining fourth world self-determination: Indigenous Self-Governance in Greenland, with implications for Torres Strait. (fix location) p.4

³⁹ Burns, M. "Cultural Fluidity" an interview with Noel Blomeley, unpublished interview transcript, Lismore NSW, Griffith University study and reading guide materials, 1995, p. 32.

⁴⁰ Morgan, G. Aboriginal Politics, self-determination and the rhetoric of community, Academy of social sciences 2006/19, p. 20

⁴¹ Short, D. Reconciliation assimilation, and the Indigenous peoples of Australia, International Political Science review (2003), vol 24, No. 4, pp, 491.

⁴² Short, D. Reconciliation assimilation, and the Indigenous peoples of Australia, International Political Science review (2003), vol 24, No. 4, pp, 492.

⁴³ Elder, B (1998), *Chapter 1 Two Hundred Years ago, Blood on the Wattle massacres and maltreatment of Australian Aborigines since 1788*, child associates Publishing Pty Ltd, Sydney Australia, pp. 15

⁴⁴ Elder, B (1998), *Chapter 1 Two Hundred Years ago, Blood on the Wattle massacres and maltreatment of Australian Aborigines since 1788*, child associates Publishing Pty Ltd, Sydney Australia, pp. 11

benign; the other was essentially sadistic and autocratic.⁴⁵ One sought harmony; the other was driven by aggression and competitiveness.⁴⁶ The Aboriginal culture under the gaze of white man was seen as, “savage.” All indigenous laws and customs were merely “barbarous customs lacking any form of democratic Government.”⁴⁷ Aboriginal Australians were given no choice, but to become wards of the state under common law.

Alongside with adapting to a new law, and system of belief, they were given the name *Aborigine* and required to become subjects under British crown and victim to harsh treatment by government bodies through practices such as forced removal of children, large scale mass murders, segregation practices, policies all of which were often carried out by government and church bodies.

The London Missionary Society, brought Christianity to Aboriginal people, forming townships under Western laws and courts and replacing aboriginal culture for European.⁴⁸ Trends, which would play a key role in ensuring the lives of Aboriginal people, were under control and inline with liberal democracy. With the introduction of religion came the creating of missions and reserves, a method used to assimilate aboriginal people into mainstream culture.⁴⁹

2.1.2 “Two white men and an Aboriginal stockman:”⁵⁰ Aboriginal Protection Policy and the Stolen Generations

⁴⁵ Elder, B (1998), *Chapter 1 Two Hundred Years ago, Blood on the Wattle massacres and maltreatment of Australian Aborigines since 1788*, child associates Publishing Pty Ltd, Sydney Australia, pp. 11

⁴⁶ Elder, B (1998), *Chapter 1 Two Hundred Years ago, Blood on the Wattle massacres and maltreatment of Australian Aborigines since 1788*, child associates Publishing Pty Ltd, Sydney Australia, pp. 11

⁴⁷ Buchan, B. The empire of political thought: perceptions of Indigenous government in Australia. Paper presented to the Jubilee Conference of the Australian Political Studies Association Australian National University, Canberra October 2002, p9

⁴⁸ Close, S. R-Imagining fourth world self-determination: Indigenous Self-Governance in Greenland, with implications for Torres Strait, Master dissertation for Griffith university, school of humanities p.4

⁴⁹ Watson, V. (2004), Axing ATSIC: Australian Liberalism and the “Government of Unfreedom”. *Policy and Society*, vol.24 no.4, pp.57-81.

⁵⁰ Kevin Rudd: Address at the apology to the Forgotten Australians and former child migrants Great Hall, Parliament House, 2007. Retrieved, May 3rd 2010 from, <http://www.theaustralian.com.au/news/nation/full-transcript-of-pms-speech/story-e6frg6nf-111115543192>

“My mother and brother could speak our language and my father could speak his, I can't speak my language, aboriginal people weren't allowed to speak their language while white people were around (...) They had to go out into the bush or talk their lingoes on their own. Aboriginal customs like initiation were not allowed (...) We could not leave Cherbourg to go to Aboriginal traditional festivals. We could have a corroboree if the Protector issued a permit, It was completely up to him. I never had a chance to learn about my traditional and customary way of life when I was on the reserves.”⁵¹

Since the publishing of the Bringing them home report (1997) and Kevin Rudd's Sorry speech, Australia's Stolen Generation has brought to surface one of the most embarrassing and shameful practices of Australia's history. I tell the story of the stolen generations in Australia to illustrate bigoted past, one that created systematic racism and socio economic inequalities.⁵² I use the testimonies of children, taken from the bringing them home report to re-tell the story of the children that survived, children of the Stolen Generation. This is the reason Kevin Rudd has chosen to acknowledge such a past. This is a past that explains the hurt and humiliation one encounters, when your human dignity, worth and human rights are violated. This is the history of Australia.

There were many reserves and settlements where children were kept under state control, with over sixty-four existing in Queensland alone,⁵³ for the purpose of my thesis I start in a place called , The Moore River Aboriginal Settlement.⁵⁴

In 1933 under the direction of A.O Neville, chief protector of Aborigines in Western Australia, all Aboriginal children of half-caste background were forcibly removed under the

⁵¹ HREOC, Confidential Submission. “Brining them Home: Commonwealth Initiatives, online text: http://www.hreoc.gov.au/social_justice/bth_report/index.html, 1997, Accessed March 2010,

⁵² Rutherford. J. Reconciliation-What does it mean? Arena Magazine, 47 June-July 2000, p36

⁵³ Howson, P. Reality and fantasy: the abject failure of Aboriginal policy. *Quadrant*, v.44, no.4, April 2000 pp.2024.

⁵⁴ I choose Moore because of it's role in the film “rabbit Proof Fence”, It aids in illustrating to the reader the lay out and institutionalization which took place in settlements around Australia.

Aboriginal Protection Act of 1869. The policy in all states of Australia advocated the removal of Aboriginal children from their families into church run missions or reserves with the primary attempt to disassociate them from their families culture. The rationale behind the removals was to indoctrinate Aboriginality out of the next generation, children were taught to think, act and behave as whites.⁵⁵ These views were particularly associated with the necessity for education, health, employment and housing. In his own words A.O Neville, chief protector of aborigines stated:

“The child is taken away from the mother, thus growing up as whites not knowing their own environment (...)”⁵⁶

Testimonies and information gathered from the Bringing them home report, revealed that children who became victims of this policy, lived in institutionalized conditions and were deeply traumatized.⁵⁷ The solitary confinement of missions and reserves were likened to institutions due to their spatial and physical environment and attempts at social control over Aboriginal people. Measures, such as the construction of barbed wire fences, and the employment of Aboriginal Trackers, were taken to prevent children within the missions from escaping.⁵⁸ The Bringing them home report details the impact of confined and strictly regimented spaces in mission and reserves as having a detrimental psychological effect on inmates.⁵⁹ Children who were interviewed by the Human Rights and Equal Opportunities Report, have recollection of physical abuse and mental abuse. With many being told their mothers were either dead, or had given up.⁶⁰

⁵⁵ Cuneen, C & Libesman, T (1995) Chapter 4 A case study: *The Removal of Aboriginal Children*, Indigenous People and the Law in Australia, Butterworths Press Sydney, Australia, p 44.

⁵⁶ Cited in John Host & Jill Milroy, *The stolen Generations: John Herron and the politics of denial*, *Studies in Western Australian History*, 22, 2001, pp 141.

⁵⁷ Gaita, Raimond (2001), *Why the impatience genocide, 'ideology' and practical reconciliation*. *Australian Book Review*, no.232, pp.25-31.

⁵⁸ Casella, E, (2001), *To watch or restrain, Female convict prisons in the 19th century Tasmania, Australia*, *International Journal of Historical Archaeology*, Vol 5, p76

⁵⁹ HREOC, Confidential Submission. “Bringing them Home: Commonwealth Initiatives, online text: http://www.hreoc.gov.au/social_justice/bth_report/index.html, 1997, Accessed March 2010,

⁶⁰ HREOC, Confidential Submission. “Bringing them Home: Commonwealth Initiatives, online text: http://www.hreoc.gov.au/social_justice/bth_report/index.html, 1997, Accessed March 2010,

*'Your family don't care about you anymore; they wouldn't have given you away. They don't love you. All they are, are just dirty, drunken blacks.'*⁶¹

The individual states continued to make policy based on a model of protection, which in practice meant reserves and church run missions ruled by missionaries under government authorities, Aborigines whether on a mission or a pastoral station, had no rights.⁶²

2.1.3 “Leading us on the narrow road, the narrow road to the kingdom of god”⁶³

The arrival of missionaries within Australia assist a great deal in the assimilation process, working alongside protection boards as advisors and “do gooders” of assimilation policies, policies that ensured the total absorption of the Aboriginal child into of European culture.⁶⁴ With these regulations in place, Aboriginal people became wards of the state forced to adopt Christian values and European values.

*“There was a big poster (...) white people, all nicely dressed, leading on this narrow road, and ‘Narrow is the road that leads us into the kingdom of life or the Kingdom of God’.”*⁶⁵

Children were forced to learn everyday European values, such as education and religion.⁶⁶ “The imperial duty was to “civilize” and conquer the unknown non-western world for imperial consumption and native edification through education, both religious and secular in which European missionaries sought to inculcate native minds and bodies with the tenets of

⁶¹ HREOC, Confidential Submission. “Brining them Home: Commonwealth Initiatives, online text: http://www.hreoc.gov.au/social_justice/bth_report/index.html, 1997, Accessed March 2010,

⁶² Barta, T. (2001). Discourses of genocide in Germany and Australia: A linked history, Aboriginal history, Vol 25, SouthWood press, Marrickville, pp. 138-141.

⁶³ HREOC, Confidential Submission. “Brining them Home: Commonwealth Initiatives, online text: http://www.hreoc.gov.au/social_justice/bth_report/index.html, 1997, Accessed March 2010,

⁶³ Deveaux, Monique A deliberative approach to conflicts of culture. *Political Theory*, Vol.31. no.6 December 2003 pp.780-807.

⁶⁵ HREOC, Confidential Submission. “Brining them Home: Commonwealth Initiatives, online text: http://www.hreoc.gov.au/social_justice/bth_report/index.html, 1997, Accessed March 2010,

⁶⁶ Barta, T. (2001). Discourses of genocide in Germany and Australia: A linked history, Aboriginal history, Vol 25, SouthWood press, Marrickville, pp. 138-141.

Western Christianity and culture.⁶⁷ For this reason boys and girls were segregated from one another. This was also used to prevent, boys and girls from inter-acting with family members.

Through segregation the practice of traditional Aboriginal cultural and contact between male and female inmates was under complete control by mission staff. Where inmates were caught engaging in traditional practices, harsh punishment would be inflicted.⁶⁸

“ They were very cruel to us, very cruel. I've done things in that home that I don't think prisoners in a jail would do today (...)”

2.1.4 Institutions

In this section I describe the institutionalization of aboriginal people within the missions and reserves and the how this relates to modern day Indigenous Affairs within government institutions. I use example of missions to make a comparative analysis of policy today and illustrate the lack of empowerment indigenous people have within their own affairs.

The Protection Act, although officially abolished, still remains as a legacy in the life of many Aboriginal people today.⁶⁹ With Aboriginal youth in Australia still remain among the highest represented within the criminal justice system and laws, such as mandatory sentencing still in practice. There raises question as to whether practices, which were carried out in missions, still influence the idea of contemporary Indigenous affairs. The common law as argued by Fisher “ continues to trade in one instate for another, by making what was once the mission a prison, foster care or juvenile remand, and what was assimilation policy is now foster care or juvenile remand.”⁷⁰ The Aboriginal trackers to, have had their name changed under public

⁶⁷ Barta, T. (2001). Discourses of genocide in Germany and Australia: A linked history, Aboriginal history, Vol 25, SouthWood press, Marrickville, p.138

⁶⁸ Thomas, C. (2001) From ‘Australian Aborigines’ to ‘White Australians’. Australian Aboriginal Studies, no.1, pp.21-35.

⁶⁹ Broadhursts, et al. Crime and Indigenous people in Graycar A & P. (eds). The Cambridge handbook of Australian criminology, Cambridge: Cambridge University, p 268)

⁷⁰ Fisher, N,(2008), Out of Context: The liberalisation and Appropriation of “Customary” Law as assimilatory Practise. ACRAWSA e-journal, Vol. 4, No. 2 p 4.

administration, they are now the new “Indigenous Police Liaison Officers”, aiding in programs such as Community Justice Agreements and restorative justice.⁷¹

I argue that despite the name change, practices implemented within missions still continue to play a large role in indigenous policy making, with “family responsibility commissions, increasing aboriginal arrest rates and deaths in custody, compulsory quarantining of welfare payments and “*shared responsibility agreements*”, all pointing to the continuance of racially-based perceptions and the psychological terra-nullius rooted in liberal doctrine.”⁷²

The same structural foundation is existent minus the physical barriers such as barbed wire fences and gates. Instead we have Government agencies that enforce barriers similar to barbed wire fences around Aboriginal people by restricting their movement from outside mainstream liberal democratic society.⁷³ Aboriginal and Torres Strait Islander Commission (ATSIC) has been the Australian Governments Indigenous Affairs portfolio as a way in which to involve Indigenous Australians in Mainstream policy making.⁷⁴ ATSIC’S functions included formulating a regional plan in consultation with local communities; advising and cooperating with government agencies at all levels in implementing the plan; and consulting with, representing and advocating for their Indigenous constituents.⁷⁵

Brigg and Murphy make further arguments in stating that; conservatisms such as Janet Albrechtsen, Peter Howson, Paul Toohey and Gary Johns, recent high-profile discussions around violence and playing out of ATSIC politics, are proof that any particular identification

⁷¹ Hatami, Nagmeh (2006) Aboriginal Authority Brings Justice and Welfare Reform: introducing community justice agreements. *Public Administration Today*, p.26-28.

⁷² Fisher, N. (2008), Out of Context: The liberalization and Appropriation of “Customary” Law as assimilatory Practice. ACRAWSA e-journal, Vol. 4, No. 2p 5

⁷³ ⁷³ Castejon, V. (2002), Aboriginal affairs: Monologue or dialogue? *JAS Australian Public Intellectual Forum*, no.75, p30.

⁷⁴ Anthony, T. (2004), self-determination after ATSIC: reappropriation of the ‘original position’. *Polemic*, v.14 no.1, p.4-7

⁷⁵ Anthony, T. (2004), self-determination after ATSIC: reappropriation of the ‘original position’. *Polemic*, v.14 no.1, p.4-7

with aboriginal culture was ignored and re-placed for mainstream options.⁷⁶ After the abolishment of ATSIC, an even more controversial policy was erected known as, Shared responsibility agreements.

Since July 2004, fifty-two Shared Responsibility agreements involving forty-three Indigenous communities have been completed across Australia in relation to initiatives addressing nutrition, community safety, business support, development and other community needs.⁷⁷ In return communities must make commitments such as improving schooling attendance, controlling substance misuse and being involved in youth recreation activities.⁷⁸ Like missions, welfare benefits and government support can be established on the conformant of mainstream values related to areas such as education and health. Shared Responsibility Agreements can be seen as a patronising and coercive process in which choices at a community level may be compromised by the need to meet government expectations in order to obtain public infrastructure and became part of the majority.⁷⁹ By introducing SRA's Governments had total control over Aboriginal communities, who then become heavily dependent on welfare.

The highest profile case, was the Mulan SRA in Western Australia, where the community committed to washing children's faces daily and other hygiene measures in exchange for the Australian Government installing petrol bowers, with the Western Australian Government agreeing to monitor and review the adequacy of health services in the community.⁸⁰

⁷⁶ Brigg, M. Murphy, L: The sad predictability of Indigenous affairs, UQ e-space credentials, Forthcoming article in Arena Magazine, August 15th 2007, p, 1

⁷⁷ Kristiansen, J (2005), Shared Responsibility Agreements, legally or morally binding? Indigenous Law Bulletin Vol 6. Issue 11, p 8-11

⁷⁸ Kristiansen, J (2005), Shared Responsibility Agreements, legally or morally binding? Indigenous Law Bulletin Vol 6. Issue 11, pp 8-11

⁷⁹ Kristiansen, J (2005), Shared Responsibility Agreements, legally or morally binding? Indigenous Law Bulletin Vol 6. Issue 11, pp 8

McCausland, R (2005), Shared Responsibility Agreements, Practical reconciliation or Paternalistic rhetoric? Indigenous Law Bulletin Vol 6, Issue 12, July 2005, pp 9-11.

⁸⁰ Cooper, D (2005), Shared Responsibility Agreements, whitewashing Indigenous Service Delivery, Indigenous Law Bulletin, Vol 6 Issue 15, Nov 2005, pp 9-11

Even though Aboriginal communities have their own forms of traditional lifestyles, governments use tools such as health services and petrol bowers in order to convince Aboriginal communities to be part of the wider society. When the Mulan SRA became public, the Government neglected to mention that the community had already cut trachoma rates from 80 percent to 16 percent as a result of their own initiative.⁸¹

These policies are programs, which still continue to patronize Indigenous people, policies, which won't help to "close the gap".

2.2 Australia's recognition of international law prior to INDRIP: What measures has Australia taken to implement Human Rights in relation to Indigenous Australians?

Since the late sixties focus, human rights in relation to Indigenous Australians were hardly mentioned.⁸² The loss of their lands and autonomy and the startling health of many indigenous Australians was a call for international action and the start of Aboriginal activism, with actions of aboriginal Australians such as Charles Perkins, shedding a light on a small part of these injustices.⁸³ Resulting in the formation of Aboriginal Political Organizations and the modern Aboriginal activists movement. The success of the Freedom Rides together with international awareness, led to a new more fort right direction in aboriginal activism.

In 1966, the Commonwealth Conciliation and Arbitration Commission was formed, after strikes undertaken by aboriginal Australians took place, protesting against poor working conditions and low wages in the workplace.⁸⁴ Further protest and activism saw the establishment of the Aboriginal Tent Embassy. Which still stands today in Canberra.

⁸¹ Cooper, D (2005), Shared Responsibility Agreements, whitewashing Indigenous Service Delivery, Indigenous Law Bulletin, Vol 6 Issue 15, Nov 2005, pp 9-11

⁸² Kompridis, N. (2005) Normativizing Hybridity/Neutralizing Culture. *Political Theory*, vol.33 no3 June 2005 pp.318-320.

⁸³ Short: (2003), Reconciliation, Assimilation and the Indigenous Peoples of Australia. *International Political Science Review*, vol.24 no.4, 490-493

⁸⁴ Chesterman, J. (2001) Defending Australia's reputation: How Indigenous Australians won civil rights (Part 1). *Australian Historical Studies*, v.32 no.116, p32-33.

Forthright protests such as these, continue to draw attention to the plight of indigenous people in Australia and their struggle for political autonomy and human rights.⁸⁵

In this section I will outline the measures Australia has taken in order to abide by it's obligation with respect to Human Rights and Indigenous Australians. I will look at the obligations the state has prior to the signing of the UNDRIP. In keeping within the perspective of empowerment, my focus is framed around the meaning of, culture, land and autonomy from an international, national and Indigenous perspective.

2.2.1 Culture as a Human Right and Australia's domestic law

To understand the importance of culture from an aboriginal perspective, I start with an extract about the dreaming in relation to the Yarely people:

“The dreaming is many things in one (...) among them a narrative of things that happened, a charter of things that still happen, and logos or principles of order transcending everything significant for aboriginal man...man, society and nature, past, present and future, are at one together with a unitary system or key guide, to the norms of conduct and prediction of how men will err.”⁸⁶

From an international perspective there are many instruments which deal with the right to culture, Article 5 (1)⁸⁷ and Article 1 (3)⁸⁸ of UNESCO,⁸⁹ the UNDHR and Article 27 of the ICCPR⁹⁰ and Article 15⁹¹ of the ICESCR.⁹², Genocide Convention⁹³ and the CERD⁹⁴ In recognition of Australia's commitment to human rights and those explicitly referring to culture, Australia has agreed to be bound by all the major instruments including the ICCPR

⁸⁵ Short, D. (2003), Reconciliation, Assimilation and the Indigenous Peoples of Australia. *International Political Science Review*, vol.24 no.4, 490-493

⁸⁶ Stanner (1987), p 225-229, cited in Mcrae et al. (2003), *Indigenous Legal Issues: Commentary and Materials*, Thomson Law book. Co, Pyrmont, New South Wales, (2003), p:80

⁸⁹ Donders, (2002), *Towards a Right to Cultural Identity*, School of Human Rights Research, Intersentia, p137

⁹⁰ Donders (2002), *Towards a Right to Cultural Identity*, School of Human Rights Research, Intersentia, p138

⁹² Donders, (2002), *Towards a Right to Cultural Identity*, School of Human Rights Research, Intersentia p138

and CESC, UNHCR and the CERD. Treaties, which have been integrated into Australia's national law.

2.2.2 Methods of Colonial Acquisition, Land and Human rights

To understand the importance of land from an aboriginal perspective I start with an extract, which evokes the relationship, the Pinjantjatjara⁹⁵ people have with their land:

“Life came from and through the land, and was manifested in the land (...)the land was not an Inanimate “thing”: It was, and is, alive, the precious essence we call life came out of the dreaming, mediated through deities and spirit beings, and sustained in it’s material form by what the land had to offer (...)”⁹⁶

From an aboriginal point of view, all land is sacred, moreover the sentimental value in which makes meaning for different aboriginal groups and their strong ties of descent.⁹⁷ It is this symbolism, relationship and sacredness, that makes the fight for land rights in Australia, an important aspect for Aboriginal people.

Land rights and Human Rights has been a particular problem for Australia, as a connection to land forms an essential part of aboriginal culture.⁹⁸ This is despite the historical Mabo decision in 1992⁹⁹, which saw the rejection of the term Terra Nullius and the formation of the Australian Native Title Act (1993).¹⁰⁰ Australia’s law is based on that of the Westminster model, which sees common law as the ruling power. Colonies of such system are either such where lands are claimed by right or occupancy. Therefore the only means of acquiring

⁹⁵ The Pinjantjatjara a small group of aboriginal people who come from south Australia, see for more information <http://www.atns.net.au/agreement.asp?EntityID=892>

⁹⁶ Mcrae et al.,(2003), Towards a Right to Cultural Identity, School of Human Rights Research, Intersentia, p 88

⁹⁷ Mcrae, (2003), Indigenous Legal Issues: Commentary and Materials, Thomson Law book. Co, Pyrmont, New South Wales, (2003), p88

⁹⁸ Fieldes, D (1998), Mabo: end of terra nullius? *Hummer*, v.2 no.4 Winter 1995 pp.33-37.

p 154-157

⁹⁹ The judicial hearing is the first the pass the high court of Australia, before this there were a number of cases in relating to native title heard . See, judicial hearing under Mabo v Queensland 1988 Native Title Act 1993 at ComLaw.

¹⁰⁰ Patton, P. (1995), Mabo, freedom and the politics of difference. *Australian Journal of Political Science*, v.30 no.1 p 108-119

territorial sovereignty or native title is by, modes of descent or conquest.¹⁰¹ This is also recognized under international law for the bases of sovereignty over lands.

Under International Law and Land claims, the concept of sovereignty takes precedent in Australia.¹⁰² The concept of sovereignty as mentioned by Mcrae et al; “therefore reflects that contemporary international law is a legal order predominantly between coordinated, juxtaposed states as it’s typical subjects.”¹⁰³

The legislation of land rights in Australia, has been seen to be of little help for the recognition of indigenous culture and their claims for land rights.¹⁰⁴ A law described by Aboriginal people and academics as the “Terra Nullius” myth, a law which was made to be in favor of Australian law.¹⁰⁵ Therefore justifications made for claiming land rights legislation in Australia are based on seven factors, which, due to factors such as dispossession and assimilation are hard to claim or prove. Based on the current Native Act (1993) and the (2007) Amendments made to the Native Act of (1993), the seven factor for justification to lands rights legislation are:¹⁰⁶

1. The spiritual link
2. An economic basis
3. Recognition of prior Indigenous ownership
4. Compensation for past dispossession?
5. Substantive equality or special measure
6. An adjunct to self-determination
7. A step towards reconciliation

¹⁰¹ Fields, D. (1988), Mabo: end of terra nullius? *Hummer*, v.2 no.4, p 33-36

¹⁰² Mcrae, (2003), Towards a Right to Cultural Identity, School of Human Rights Research, Intersentia, p 140-147

¹⁰³ Mcrae, (2003), Towards a Right to Cultural Identity, School of Human Rights Research, Intersentia, p147

¹⁰⁴ Morgan, (2006), p21-27

¹⁰⁵ McLachlan, (1988), The Recognition of Aboriginal Customary: Pluralism beyond the Colonial Paradigm: A Review Article. *The International and Comparative Law Quarterly*, vol.37, no.2, p386.

p375

¹⁰⁶ Mcrae et al, (2003), Towards a Right to Cultural Identity, School of Human Rights Research, Intersentia, p200-203.

It becomes clear in the case of Native Title and the promotion of Human Rights, Australia is still in need of improvement. The Aboriginal Land Commissioner observed this matter stating that;

“ It has become increasingly clear during the hearing of land claims that when concepts are being explored, much depends on the way in which the questions are being framed (...) thus, if peoples are asked who is *Kirda* for the country they will answer in terms of their patriline.”¹⁰⁷

From an international prospect, Australia is bound to legally binding treaties, the ICCPR, and ICESCR and the UDERD. Although legally binding they do not make mention to Indigenous people, but instead indicate the promotion of culture.¹⁰⁸

2.3 Australia v. The UN: Recommendations made by the HRC

By the early 1960's Australia received increased International condemnation from the HRC for laws which racially discriminate it's indigenous people, with one of the biggest critics based on Australia's discriminatory legislation towards aboriginal people.¹⁰⁹

As part of the commitment for the realization of Human Rights, Australia is obligated to deliver periodic reports to Human Rights Committee. Due to Australia's discomfoting record in relation to indigenous people, the Government is often reluctant to identify such practices.

¹¹⁰ for the reason, Australia has failed to submit such reports on the given deadline.¹¹¹

Despite this, the work human rights reporters and the various NGO's have helped raised the profile of human rights in Australia.

¹⁰⁷ Mcrae et al, (2003), Towards a Right to Cultural Identity, School of Human Rights Research, Intersentia p 208

¹⁰⁸ Brownlie et al (2006), Basic Documents on Human Rights, 5th Edition, Online Resource Centre, Oxford p:336,

¹⁰⁹ Chesterman, J. (2001) Defending Australia's reputation: How Indigenous Australians won civil rights (Part 1). *Australian Historical Studies*, v.32 no.116, p32-33.

¹¹⁰ Berhttp://www.hreoc.gov.au/human_rights/un_committee/index.html#mandatory_sentencingford et al, (1996) 28-34

¹¹¹ HRC Australia, (2006) Australia's Human Rights Record Reviewed by the UN Human Rights Committee committee: http://www.hreoc.gov.au/human_rights/un_committee/index.html#indigenous_selfdetermination

Areas of concern from the HRC are centered around issues of self-determination, Native title protection and mandatory sentencing.¹¹² These observations are made in accordance to Australia's commitment to the principles set out in the ICCPR, ICESCR and the CERD.

In this section I will explain concerns made by the Human Rights Committee, towards Australia and the treatment of their indigenous people. For the purpose of this thesis I will focus on the latest report in 2000 and Australia's response, to principal subjects of concern in areas of Self- determination, Native title and heritage protection and mandatory sentencing.

2.3.1 Self-Determination

In relation to self-determination the committee raised concerns over actions made by the Howard government in eliminating programs such as ATSIC, a body they considered a symbol for self-determination and empowerment for indigenous Australians.¹¹³ The committees' comments in relation to Article 1 of the ICCPR were as follows:

"The present government has abandoned self-determination as policy guiding Indigenous affairs (...) In November 1996 the Minister for Aboriginal and Torres Strait Islander Affairs announced that the government's Indigenous affairs policy would no longer be based on the principle of self-determination (...) Instead, government policy is now based on the concept of 'self-empowerment (...)' This concept, which has no meaning in international law, is exemplified by the government's calls for Indigenous peoples to move beyond welfare dependency..."¹¹⁴

These comments were then followed by recommendations

"With respect to Article 1 of the ICCPR, the Committee takes note of the explanation given by the delegation that rather than the term 'self-determination' the Government of the State party prefers terms such as 'self-management' and 'self-empowerment' to express domestically

¹¹² Rutherford, Jodhi Reconciliation – what does it mean? A culture of denial lives on. *Arena Magazine*, 47 June-July 2000 pp.36-39.

¹¹³ Behrendt, L. (2003), *Habeus Corpus: ATSIC is gone but the problems it was not allowed to address remain. Arena Magazine*, p135

¹¹⁴ HRC Australia, (2006) Australia's Human Rights Record Reviewed by the UN Human Rights Committee committee: http://www.hreoc.gov.au/human_rights/un_committee/index.html#indigenous_selfdetermination

the principle of indigenous peoples exercising meaningful control over their affairs (...) The Committee is concerned that sufficient action has not been taken in that regard.”

Australia then defended their position on the grounds of Article 27 of the ICCPR in changing their position on self-determination in relation to matters related to self-empowerment.¹¹⁵

2.3.2 Native Title

As mentioned previously, claims for Native Title are becoming increasingly difficult for indigenous Australians, due to amendments made under the current government, and priority given to stakeholders.¹¹⁶ This in turn, has lead to negative repercussions from the HRC. The committee argues that Under Article 27 of the covenant, amendments made to the Native Act (1996), were in violation of Australia’s obligation to protect Indigenous heritage and culture.¹¹⁷ With the submissions given by the HRC outlining that provisions for the Amendments made to the Native Title Act (1996), gave stakeholders and mining companies more right over land claims.¹¹⁸ In their concluding comments, the HRC made recommendations that;

“The State party take further steps in order to secure the rights of its indigenous population under article 27 of the Covenant (...) The high level of the exclusion and poverty facing indigenous persons is indicative of the urgent nature of these concerns (...) In particular, the Committee recommends that the necessary steps should be taken to restore and protect the titles and interests of indigenous persons in their native lands, including by considering amending anew the Native Title Act, taking into account these concerns.”¹¹⁹

“Fisher argues that: “In the Land Rights Act and the Mabo Decision, Aboriginal Law- particularly that regarding “rights to land” and “ownership” of country- is studied, re interpreted and regurgitated in an appropriated form and, so, robbed of its context and

¹¹⁵ HRC Australia, (2006) Australia’s Human Rights Record Reviewed by the UN Human Rights Committee committee: http://www.hreoc.gov.au/human_rights/un_committee/index.html#indigenous_selfdetermination

¹¹⁶ Reilly, A. (2006), A constitutional framework for Indigenous governance. *Sydney Law Review*, vol.28 no.3 p405-410

¹¹⁷ HRC Australia, (2006) Australia’s Human Rights Record Reviewed by the UN Human Rights Committee committee: http://www.hreoc.gov.au/human_rights/un_committee/index.html#native_title

¹¹⁸ HRC Australia, (2006) Australia’s Human Rights Record Reviewed by the UN Human Rights Committee committee: http://www.hreoc.gov.au/human_rights/un_committee/index.html#native_title

¹¹⁹ HRC Australia, (2006) Australia’s Human Rights Record Reviewed by the UN Human Rights Committee committee: http://www.hreoc.gov.au/human_rights/un_committee/index.html#native_title

meaning.”¹²⁰ Native title at this stage, and land rights offer little hope for indigenous people and their claims for culture.

2.3.3 Mandatory sentencing

The experience of Indigenous people and their contact with the Australian criminal justice system has been characterized by the HRC as discriminating and inappropriate.¹²¹ Along with the over-representation of Indigenous Australians within the criminal justice systems, is the over-whelming issue of Aboriginal Deaths in custody. A concern, which has been described as “the most tragic manifestation of the injustices which indigenous Australians suffer at the hands of the criminal justice system.”¹²² Following this concern the Royal Commission in Aboriginal Deaths in Custody (RCIADIC) was set up to investigate the over-representation of indigenous custodial deaths. The over-all findings of the RCIADIC were clear in identifying a strong over-representation of Indigenous deaths in custody and discrimination amongst Australian police and the criminal justice system.¹²³ This has also been followed by views from frustrated Aboriginal People, who are starting to ask the question of

“How many more books must be written to explain the phenomenally high rates of Aboriginal Imprisonments (...).”¹²⁴

The most distinctive conclusion found by the RCIADIC, which matches the concerns of the HRC, is that of Mandatory sentencing and over-representation. With point 1.3.3 of the RCIADIC, stating;

“The conclusions are clear (...) Aboriginal people die in custody at a rate relative to their proportion of the whole population”¹²⁵

¹²⁰ Fisher, N. (2008), Out of Context: The liberalisation and Appropriation of “Customary” Law as assimilatory Practise. ACRAWA e-journal, Vol. 4, No. 2, p6.

¹²¹ HRC Australia, (2006) Australia’s Human Rights Record Reviewed by the UN Human Rights Committee committee: http://www.hreoc.gov.au/human_rights/un_committee/index.html#mandatory_sentencing

¹²² Mcrae, (2003), Towards a Right to Cultural Identity, School of Human Rights Research, Intersentia p:474

¹²³ Bereford et al. (1996), Rites of Passages: Aboriginal youth, crime and justice, Freemantle Arts Centre Press, Freemantle, Western Australia, p:19-27

¹²⁴ Sutton, 1984: p 363, cited in Bereford et al, (1996), Rites of Passages: Aboriginal youth, crime and justice, Freemantle Arts Centre Press, Freemantle, Western Australia p .19.

These concerns were also made by the HRC in relation to Article 2.1, Article 2.6, Article 9.1 and Article 14.5 of the Covenant. In their concluding statement on Mandatory sentencing, the HRC stated;

"Mandatory sentencing laws target particular property offences that are generally committed by people of lower socio-economic backgrounds (...) They are discriminatory in effect against Indigenous people in particular (...)"¹²⁶

This was elaborated further more in breach of Article 50 of the CERD and Australia's power to override the current mandatory sentencing acts:

"The federal government has constitutional power to override mandatory sentencing laws but has explicitly chosen not to do so, in breach of its obligations under Article 50. The Committee on the Elimination of Racial Discrimination has expressed concern at the failure to ensure compliance with these obligations (...)"¹²⁷

Despite concerns expressed by the HRC, mandatory sentencing in Australia, still remains in practice. Furthermore in March 2007, Australia suspended the Racial Discrimination Act (1975) replacing it for the controversial Northern Territory Intervention. The Australian Government justified the move as: "Special Measure" under Article 1 (4) of the ICERD.¹²⁸

Under article (4) a Special Measure is classified as such;

"Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different

¹²⁵ See Annex: 1.1 Levels of Aboriginal over-representation, in relation to compulsory Mandatory Sentencing laws.

¹²⁶ HRC Australia, (2006) Australia's Human Rights Record Reviewed by the UN Human Rights Committee committee: http://www.hreoc.gov.au/human_rights/un_committee/index.html#mandatory_sentencing

¹²⁷ HRC Australia, (2006) Australia's Human Rights Record Reviewed by the UN Human Rights Committee committee: http://www.hreoc.gov.au/human_rights/un_committee/index.html#mandatory_sentencing

¹²⁸ Submission of the HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION (HREOC) to the Senate Legal and Constitutional Committee, (August 2007), http://www.hreoc.gov.au/legal/submissions/2007/NTNER_Measures20070810.html

racial groups and that they shall not be continued after the objectives for which they were taken to have been achieved(...)"¹²⁹

3 CHAPTER THREE: INTERNATIONAL LAW & INDIGENOUS PEOPLES

3.1 The International Labor (ILO) Organization 169

The International Labor Conference adopted the convention 169 on Tribal and Indigenous peoples in 1989. Making it one of the few intergovernmental organizations to have concerned itself with indigenous and tribal peoples and the issues facing them.¹³⁰ With Australia being one of the few countries not to adopt.¹³¹ It set precedent for issues addressing vital importance to tribal people and including the rights to occupy possession over lands, for the preservation of their culture. Being a covenant, this makes the provisions, which are mentioned, legally bound hard law. Despite this the ILO convention does not come without criticism.

Although legally binding the heavy use of qualifications of ILO 169 have made it weaker. Criticism from Indigenous people also highlighted the lack of participation they were granted in their own affairs.¹³² The controversy, which surrounds this convention, is still ongoing today. It is therefore necessary for me to analyze the ILO 169 in relation to the rights of Indigenous peoples and the complications, which evolve from a convention, which seeks to empower indigenous people.

¹²⁹ Brownlie et al (2006), Basic Documents on Human Rights, 5th Edition, Online Resource Centre, Oxford, p336.

¹³⁰ State of the worlds indigenous peoples, Economic and social affairs ST/ESA/3282006, retrieved March 12 2010, from <http://www.unpo.org/content>

¹³¹ Unrepresented Nations and peoples Organisations, ILO convention 20 years, Friday, 26 June 2008Schulting, G. (n.d) ILO Convention 169: Can it help?, Journal of the South and Meso American Indian Rights Centre, accessed March 25 2010 from: <http://saiic.nativeweb.org/ayn/schulting.html>

¹³² 9, retrieved March 4 2010 <http://www.unpo.org/content/view/9746/236/>

From a land a culture point of view, states have been reluctant to accept agreements in this area, based on arguments regarding state integrity.¹³³ Culture rights constitute for an important part of the convention, including explicit references made to cultural identity in Articles 2 (2) and Article 5 of the convention.¹³⁴ Article 2 (2) states that,

“ Such action to protect the rights of indigenous peoples and to guarantee respect for their integrity(...) Promoting the full realization of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions...”¹³⁵

Article 5 then goes on to state that,

“In applying the provisions of this convention:

(a) the social, cultural, religious and spiritual practices of these people shall be recognized.”¹³⁶
This is an illustration of the convention, but the overwhelming support during the adoption of the convention still remains vague.¹³⁷ Donders in her statement on Culture rights and the ILO 169, states that,

“The unwillingness of the states is due to the sheer vagueness of the provisions and the corresponding state obligations as, for example, in relation to Article 14 n Land rights, and to the collective dimension, and the debate on self-determination of indigenous peoples...”¹³⁸”

¹³³ Schulting, G. (n.d) ILO Convention 169: Can it help?, Journal of the South and Meso American Indian Rights Centre, accessed March 25 2010 from: <http://saiic.nativeweb.org/ayn/schulting.html>

¹³⁴ Donders, Y, Towards a right to cultural identity, chapter VIII, school of Human rights research, Vol 15, Intersentia, 2002, p210

¹³⁵ Donders, Y, Towards a right to cultural identity, chapter VIII, school of Human rights research, Vol 15, Intersentia, 2002, p211

¹³⁶ Donders, Y, Towards a right to cultural identity, chapter VIII, school of Human rights research, Vol 15, Intersentia, 2002, p211

¹³⁷ Donders, Y, Towards a right to cultural identity, chapter VIII, school of Human rights research, Vol 15, Intersentia, 2002, p214

¹³⁸ Donders, Y, Towards a right to cultural identity, chapter VIII, school of Human rights research, Vol 15, Intersentia, 2002, p214-215.

3.2 Drafting the UNDRIP

In 1985, after negotiation with stakeholders and states, the Working Group on Indigenous Populations began the drafting process of the UNDRIP. Which also involved negotiations with indigenous people themselves. In saying this, states had the last say in the negotiating process and were hesitant with many aspects of the declaration, particularly those related to culture and definition.

States reluctant to be part of the drafting process, mainly included those with large economic interest in land.¹³⁹ “Among other problems, was the language used which gave indigenous peoples a right of veto over national legislation and state management of resources.”¹⁴⁰ Due to the past practices assimilative practices and large displacement of indigenous people within colonized states, the inclusion of the term genocide was also questionable. With the Ad Hoc committee removing the definition, instead opting for a more general view of that mentioned in the Universal Declaration.¹⁴¹

Upon the adoption of the UNDRIP, it was agreed by states that the declaration would not have any legally binding obligations, with the only exception being those that reflect customary law or *ius cogens*.¹⁴² , With the working group for Indigenous people, along with NGO’s, taking on a supervisory role.

3.2.1 The General Assembly adopts Declaration on the rights of Indigenous and tribal peoples

Like the ILO convention 169, The United Nations Declaration on the rights of Indigenous peoples, emphasizes the shift in conceptual approach towards one based on respect for the specific identity of indigenous peoples, and their right to participate in the decision-making process in all questions and programs directly affecting them, that is to say, to participate in

¹³⁹ Donders, Y, Towards a right to cultural identity, chapter VIII, school of Human rights research, Vol 15, Intersentia, 2002, p 40

¹⁴⁰ UN Declaration on the Rights of Indigenous peoples, www.un.org/esa/socdev/unpfii/en/drip.html, accessed December 15, 2009.

¹⁴¹ Reynolds, H. (2006), , The Other Side of the Frontier , University of New South Wales Press, p 50-55

¹⁴² Donders, Y, Towards a right to cultural identity, chapter VIII, school of Human rights research, Vol 15, Intersentia, 2002, p223

the making of decisions and the determination of their own destiny.¹⁴³ The declaration has 46 operative articles and is based on the concept of participation and representation. By adopting the Declaration, states are acknowledging that indigenous people are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such.¹⁴⁴ The principle is that indigenous peoples will be free to address their own political administration and affairs under the protection of the United Nations and International community who are in favor of the declaration.

“Recognizing that Indigenous peoples have the collective right to live in freedom, peace and security “as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.”¹⁴⁵

Its aim is to address issues of vital importance to Indigenous people such as autonomy, culture land rights, and the controversial idea of self-determination, an area which was under much discussion and debate by states and Australia having it’s own reservations on the term in the form of land rights.

Australia supported the full engagement of indigenous peoples in the democratic decision-making process, but did not support a concept that could be construed as encouraging action that would “impair”, even in part, the territorial and political integrity of a state with a system of democratic representative Government.¹⁴⁶

4.0 “CLOSING THE GAP”: AUSTRALIA AND THE UNDRIP

In her address to the Australian Parliament, Minister for indigenous affairs, Jenny Macklin praised the UNDRIP stating;

“The Declaration gives us new impetus to work together in trust and good faith to advance

¹⁴³ Schulting, G. (n.d) ILO Convention 169: Can it help?, Journal of the South and Meso American Indian Rights Centre, accessed March 25 2010 from: <http://saic.nativeweb.org/ayn/schulting.html>

¹⁴⁴ UN Declaration on the Rights of Indigenous peoples, www.un.org/esa/socdev/unpfii/en/drip.html, accessed December 15, 2009.

¹⁴⁵ Article 7 (2): UN Declaration on the Rights of Indigenous peoples, www.un.org/esa/socdev/unpfii/en/drip.html, accessed December 15, 2009.

¹⁴⁶ UN Declaration on the Rights of Indigenous peoples, www.un.org/esa/socdev/unpfii/en/drip.html, accessed December 15, 2009.

human rights and close the gap between Indigenous and non-Indigenous Australians”

¹⁴⁷ reversing the words spoken by Australia's representative Robert Hill;

“The UNDRIP has failed in many respects for the implementation in Australia.”¹⁴⁸

The main concern being, principles of self-determination, native title and customary law.

This argument was turned over when Australia signed the UNDRIP in April of 2009. With praise given by aboriginal leaders for its adoption. Now that Australia has adopted the UNDRIP, is it necessary to summarize, how the realization of culture, land and self-determination, can be applied at a national level.

As outlined above, the fulfillment of cultural rights is important for any positive outcome to be achieved. “Ultimately, the balancing of the universality of human rights and the accommodation of distinct cultural contexts are necessary to ensure and maintain the rich diversity of humankind.”¹⁴⁹ In saying this, the actual realization of Human Rights can only be met under the democracy and the rule of law. The UNDRIP, in connection to the fulfillment of Human Rights and its inter-related, interdependent nature to the rule of law and democracy. This is found in Article 17 (1) and 46 (3), with article 46 (3) specifically stating that;

Article 17 (1)

“Indigenous individuals and peoples have the right to enjoy fully the rights established under applicable international and domestic law.”¹⁵⁰

Article 46 (3)

“The Provisions set forth in this declaration shall be interpreted in accordance with principles of, justice, democracy, respect for human rights, equality, non-discrimination, good

¹⁴⁷ State of the world's indigenous peoples, Economic and social affairs ST/ESA/3282006, retrieved March 12 2010, from <http://www.unpo.org/content>

¹⁴⁸ speech made by Robert Hill GA/10612 (2007), General Assembly adopts declaration on rights of indigenous peoples; “Major step forward” Towards Human Rights for all, says president, 107th & 108th meetings, retrieved and accessed January 16th 2010, from: <http://www.un.org/News/Press/docs/2007/ga10612.doc.htm>.

¹⁴⁹ State of the world's indigenous peoples, Economic and social affairs ST/ESA/3282006, retrieved March 12 2010, from <http://www.unpo.org/content>

¹⁵⁰ Article 46 (3): UN Declaration on the Rights of Indigenous peoples, www.un.org/esa/socdev/unpfii/en/drip.html, accessed December 15, 2009.

governance and good faith.”¹⁵¹

This is followed by Article 46 (1), which outlines the protection of state sovereignty;

Article 46 (1)

“ Nothing in this declaration may be interpreted as implying for any state, people, group or person any right to engage in any activity (...) which would dismember or impair totally or in part, the territorial integrity or political unity of sovereignty and independent of states.”¹⁵²

Some practices, in which Aboriginal people are accustomed, cannot be recognized to some degree if they are not in line with the rule of law and democracy. It is at this point that principles relating to culture and self-determination, which make matters more, complicated. Especially for areas related to women (women’s business) and customary law. ¹⁵³ This was evident in the *Hidermarsh Island Bridge Act 1996*, which after adopted, made way for a bridge to be built in the Murray River Estuary. ¹⁵⁴ Despite arguments made by Indigenous women, about the significance symbolization it represented for their culture. ¹⁵⁵

Article 31 (1), makes specific reference to cultural tradition and heritage:

“ Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional expressions, as well as manifestations in their sciences (..They also have the right to maintain their intellectual property.

¹⁵¹ Article 46 (3): UN Declaration on the Rights of Indigenous peoples, www.un.org/esa/socdev/unpfii/en/drip.html, accessed December 15, 2009.

¹⁵² Article 46 (1): UN Declaration on the Rights of Indigenous peoples, www.un.org/esa/socdev/unpfii/en/drip.html, accessed December 15, 2009.

¹⁵³ Reilly, Alexander A constitutional framework for Indigenous governance. Sydney Law Review, vol.28 no.3, September 2006 pp.403-435.

¹⁵⁴ Fisher, N. (2008), Out of Context: The liberalisation and Appropriation of “Customary” Law as assimilatory Practise. ACRAWA e-journal, Vol. 4, No. 2, p 5

¹⁵⁵ Fisher, N. (2008), Out of Context: The liberalisation and Appropriation of “Customary” Law as assimilatory Practise. ACRAWA e-journal, Vol. 4, No. 2, p 5

The right to participate in culture is important for indigenous people, especially for indigenous women whose rights under aboriginal customary law, differ from those of men.

Article 44 of the UNDRIP creates complications within this area by stating that;

“All rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

In this sense, the Australian Government will still not accept these practices under the rule of law. Aboriginal law differs from the traditional rule of law principles, it encompasses the law of human relations, mutual respect for the land and others.¹⁵⁶ This is not recognized internationally or within Australia's jurisdiction. The only attempts, which are formed to address aboriginal law and culture domestically, are the commission set up to have the need for uniformity of laws between states, these include; *The Australia Law Reform, The recognition of Customary Laws (1986)*, *The Northern Territory Law reform Committees, Aboriginal customary law (2003)* and *the Western Australia's Aboriginal Customary Laws (2005)*.¹⁵⁷

4.1.2 Rights based approach and implications for implementation

As outlined above, the UNDRIP has the potential to be an advisory mechanism for states and their obligations to respect and promote human rights. However, this obligation can only be partially met due to factors, which cannot be controlled by indigenous peoples. In this section I will consider some of the main factors which may affect the implementation of UNDRIP and the implementation of human rights.

¹⁵⁶ Fisher, N. (2008), Out of Context: The liberalisation and Appropriation of “Customary” Law as assimilatory Practise. ACRAWA e-journal, Vol. 4, No. 2, p 5

¹⁵⁷ Fisher, N. (2008), Out of Context: The liberalisation and Appropriation of “Customary” Law as assimilatory Practise. ACRAWA e-journal, Vol. 4, No. 2, p 10

4.1.3 The power of defining

Under international law one of the theoretical problems faced when analyzing law, is the lack of definition or unclear meaning of terms.¹⁵⁸ Such a comprehensive language makes it difficult to define terms such as Indigenous peoples and the claims for self-determination. In the context of international law giving definition and meaning to such terms, is necessary in order to make claim to a given right.¹⁵⁹ This is crucial given that claims to self-determination are rejected by states and replaced by in favor for forms of semi-autonomy.¹⁶⁰

The approach in which the International covenant on civil and political rights takes on indigenous peoples is one based on equality and the notion of self-determination and peoples. In mentioning the right to self-determination it is a complex and controversial concept, which even today after the signing of the United Nations Declaration on the rights of Indigenous and Tribal peoples. The concept self-determination can be found in both the, ICCPR and the, ICESCR Article 1 and 2 of the ICCPR and ICESCR reads:

All peoples have the right of self-determination (...) By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.¹⁶¹

All peoples may, for their own ends freely dispose of their natural wealth and resources without prejudice to any obligations arising out of the international economic co-operation, based upon the principle of mutual benefit, and international (...) In no case may a people be deprived of it's own subsistence.¹⁶²

¹⁵⁸ Robertson, G. (2003), *Crimes Against Humanity: The Struggle for Global Justice*, New Press, p30

¹⁵⁹ Smith, R. (2007), *International Human Rights*, Online Resource Centre, 3rd Ed, Oxford , p321

¹⁶⁰ Smith, R. (2007), *International Human Rights*, Online Resource Centre, 3rd Ed, Oxford , p322

¹⁶¹ Brownlie et al (2006), *Basic Documents on Human Rights*, 5th Edition, Online Resource Centre, Oxford p:336

¹⁶² Brownlie et al (2006), *Basic Documents on Human Rights*, 5th Edition, Online Resource Centre, Oxford p:348

Despite its reference to “all peoples” there is no state who has accepted an unconditional right to self-determination. “Plus the right to self-determination does not imply a right to secession, due to the principles of national unity and territorial integrity, which generally prevails over claims for self-determination”¹⁶³

Reference made to self-determination can also be found in Article (1) of the UN charter:

“Indigenous peoples in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions”¹⁶⁴

Again, mention is being made to the term self-determination, but no clear definition is given under legally binding treaties, which makes the term loose and difficult to implement. At this stage the United Nations Charter is more of an advisory mechanism.

Mcrae, et al. argues that self-determination within international politics operates in three ways.

“Firstly, self-determination is underpinned by notions of equality;
Secondly, its application operates within the existing instruments of nation states; and
Thirdly, self-determination is encapsulated in democratic principles and practices(...)
Both the ICCPR and ICESCR contain strong non-discrimination provisions that
Account for the equality issues.”¹⁶⁵

If Australia is to start moving within the direction of self-determination again, there needs to be a clear definition of what is meant by this term, and a focus upon what actively supporting the self-determination principle as understood by Aboriginal people.¹⁶⁶ Reynolds argues that the interest of states has always been priority within international politics and makes reference to this within the 1970 Declaration on Principles of Internal Law Concerning Friendly

¹⁶³ Donders, Y, Towards a right to cultural identity, chapter VIII, school of Human rights research, Vol 15, Intersentia, 2002, p 207.

¹⁶⁴ General Assembly, GA/10612, sixth-first General Assembly plenary, 107th & 108th meetings, Department of public information, News and Media division, New York, p.3

¹⁶⁵ Indigenous Legal Issues, Heather McRae, Garth Nettheim, Laura Beacroft. LBC Information Services, Second Edition. Sydney 1997 p. 474

¹⁶⁶ Murphy, L, Who's Afraid of the Dark? Australia's Administration in Aboriginal Affairs, dissertation to the Centre for Public Administration, University of Queensland, 2000, p. 60.

Relations and Co-operation Among States.¹⁶⁷

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or color.¹⁶⁸

The reality is far from that which is applied to on paper, particularly when loose terms such as, self-determination are used. It becomes merely a concept for Indigenous people rather than a realistic path to change, empowerment and sovereignty for indigenous peoples. The declaration can be said to be a “vehicle for indigenous critiques of the state’s imposition of control, by forcing states to recognize large inconsistencies between it’s own principles, and it’s treatment of native people, it has pointed to the racism and contradiction inherent in settler states claimed authority over non-consenting peoples.”¹⁶⁹

The ILO 169, ICCPR, ESCR all make mention to these terms, such as peoples and self-determination, but the definition remains ambiguous. Instead, descriptions given by Special Rapporteurs and those specified in the ILO and UNDRIP, are the terms which are generally used.¹⁷⁰ One of these definitions include that of Jose Martinez, special Rapporteur for the rights of indigenous populations:

“Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them (...) They form at present non-dominant sectors of society and are determined to

¹⁶⁷ Reynolds. H. *Aboriginal Sovereignty*, Allen & Unwin. Sydney 1996 p. 164

¹⁶⁸ Reynolds. H. *Aboriginal Sovereignty*, Allen & Unwin. Sydney 1996 p. 171

¹⁶⁹ Alfred, T. *Peace, Power, Rightousness. An indigenous manifesto*. Oxford University Press, Ontario, p. 55.

¹⁷⁰ Donders, D. (1995) Mabo: end of terra nullius? *Australian Journal of Political Science*, v.2 no.4, p204

preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples in accordance with their own cultural patterns, social institutions and legal systems.”¹⁷¹

As mentioned in this definition, the distinct uniqueness of indigenous peoples is important for the preservation of their culture. This discussion has also led to states using the term Populations rather than peoples as the recognition of the term “peoples”. The recognition of Indigenous peoples as “peoples” would imply the right to self-determination under legally bound conventions such as the ICCPR and ICESCR.¹⁷² Finally, by using the term “peoples” Indigenous peoples, are seen to be unique from minorities.¹⁷³

The mechanisms used to supervise the UNDRIP are essential for its implementation.¹⁷⁴ The place and position in which Australia has within the treatment of its indigenous peoples, has been damaging for its reputation,¹⁷⁵ making the need for supervision, under Australia’s circumstances, more vital. The supervisory mechanisms of the UNDRIP are based on Article 41 of the declaration.

5. CHAPTER FIVE: CONCLUSION

5.1 Complications for UNDRIP from an international perspective

The main issues as outlined in this thesis when implementing the UNDRIP, is the conformant of states to fully accept the provisions. There is also little willingness of states to accept terms related to culture, autonomy and land, instead opting for loose terms such as “participate”.¹⁷⁶ This is followed by the protection of state sovereignty and the power in which states have to protect their own interest, under their protection of national constitutions.

¹⁷¹ UN doc. E/CN.4/sub.2/1986/7/Add.4, Jose R. Martinez Cobo, P.29

¹⁷² Donders, D. (1995) Mabo: end of terra nullius? Australian Journal of Political Science, v.2 no.4, p 205

¹⁷³ Donders, D. (1995) Mabo: end of terra nullius? Australian Journal of Political Science, v.2 no.4, p205

¹⁷⁴ Kymlicka, W. (2008), "The internationalization of minority rights" International Journal of Constitutional Law, 6 (1), p 13

¹⁷⁵ Kukathas, C. (2003) Responsibility for Past Injustice: how to shift the burden. *Politics, Philosophy & Economics*, vol.2 no.2, p167

¹⁷⁶ United Nations Declaration on the Rights of Indigenous peoples (2007), Article 18, accessed January 6th from <http://www.un.org/esa/socdev/unpfii/en/drip.html>

The complex defining of terms and principles such as “peoples” and “cultural genocide” is still evident in the UNDRIP. Terms in which states still refuse to define. Instead opting to use the terms such as “peoples” interchangeably. For example, when the UN talks about “Peoples” having a right, it is referring instead to the institutions of the state that represent the people, meaning that one state can’t impose upon another peoples, it is not taken literally.¹⁷⁷

Although the UNDRIP makes mention to culture and the importance of it’s recognition, there are complications with applying the principles of culture Universally. For this reason it is the interdependency and inter-relation the declaration has with the rule of law that make the principles applicable. “Furthermore, cultural diversity is preferable to cultural imperialism, which would be antithetical to the objective of respecting and promoting international human rights.”¹⁷⁸ Falk further asserts this:

“ [T]he interplay of different cultural and religious traditions suggests the importance of multi-civilization dialogue involving the participation of various viewpoints, especially those with non-Western orientations(...) The world does not need a wholesale merging of different cultures and civilizations; rather, it simply needs to foster a new level of respect and reconciliation between and among its ever changing and ever diverse peoples and nations.”¹⁷⁹

5.2 Can the UNDRIP offer a pathway toward empowerment for Indigenous Australians?

Culture is a valuable asset in forming ones identity and in establishing a common interest amongst group members.¹⁸⁰ In this sense it is important to outline whether or not culture is being used as a way in which to promote the declaration and create ownership. Despite its

¹⁷⁷ Robertsen, G. (2003) Crimes Against Humanity: The Struggle for Global Justice, Penguin Press, United Kingdom, Allen Lane, p 400-415

¹⁷⁸

¹⁷⁹ Falk (2000), cited in State of the worlds indigenous peoples, Economic and social affairs ST/ESA/3282006, retrieved March 12 2010, from <http://www.unpo.org/content>

¹⁸⁰ Anthony, T. Aboriginal self-determination after ATSIC: re-appropriation of the aboriginal position, Polemic, Volume 14, issue 1, p.4.

importance, culture still remains a controversial concept when taken mixed with diplomacy and powering his statement about culture Dieter, states; “ Culture is often used as an omnibus concept, a catch-all for all sorts of social traits and dispositions, from folkways to religious rituals and beliefs, from norms and values to traditions of law, from conversation habits to dress codes.”¹⁸¹

Under international law the ILO convention 169 and United Nations Declarations on the rights of Indigenous people(s), play an important role in developing international legal standards for the preservation of Indigenous culture. The culture-based argument is used throughout the declaration along with references made to, self-determination and autonomy. With this said, reference is then made to the terms,

Collective,

Group right and

Fundamental freedoms

In his novel, *Peace power and righteousness*, Taiaike Alfred argues in relation to Canadian Indians, “In the area of culture, folklore and the arts are promoted while traditional political values are denied validity in the process of negotiating new relationships, with the state defending it’s right to create “Native communities” and determine their membership.”¹⁸²

Are the interests of Indigenous Australians being taken into consideration or is their culture being appropriated? One is free to try and maintain culture, but to what extent? Article 15 (2007) states that:

“(…) Indigenous people have the right to the dignity and diversity for their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information”

¹⁸¹ Heinz-Dieter, M. Tocquville’s cultural institutionalisation: Reconciling Collective and Methodological Individualism, *Journal of Classical Sociology*, University at Albany, p.197.

¹⁸² Alfred, T. *Peace Power and Rightousness, An indigensou Manifesto*, Oxford University Press, Canadian Cataloguing in Publication Data, Ontario, p. 4.

The word “appropriately” is used within article 15 of the declaration, re-affirming the framework in which the declaration is working within. The language, which the Australian Government and International community operatives, imply that Aboriginal people take a passive position to the implementation of the declaration, while the government plays a pro-active role in determining how these recommendations will be implemented.¹⁸³ Bodies such as The Royal commission into Aboriginal deaths in custody, ATSIC, Native title and Aboriginal Justice Advisory have all claimed to be working towards cultural empowerment and “self-determination” for indigenous people. This mainstream network of funding agencies persists with a conservatism that’s shies form any fundamental philosophical or structural change, opting instead for a mechanism that is able to absorb new ideas and new ways of approaching certain issues within the already existing structure.¹⁸⁴ The fact is that the hierarchical structures continues to produce and implement policies that suit its own interest while using tried and proven strategies of divide and conquer to disarm the call for fundamental change that is coming from non-white groups all over the country, and from non-white individuals who are co-opted into the system.¹⁸⁵

According to the declaration, it is the responsibility of the states to provide specific policies, which allow for Indigenous peoples to contribute their own ideas. Under Article 27, States shall establish and implement, in conjunction with indigenous peoples concerned, a fair; independent, impartial, open and transparent process, giving due recognition to Indigenous peoples laws, traditions, customs and land tenure systems.¹⁸⁶

“Indigenous people have the right to the dignity and diversity for their cultures, traditions, mainstream network of funding agencies persists with a conservatism that’s shies form any fundamental philosophical or structural change, opting instead for a mechanism that is able to absorb new ideas and new ways of approaching certain issues within the already existing

¹⁸³ Murphy, L. Who’s Afraid of the Dark? Australia’s Administration in Aboriginal Affairs, dissertation to the Centre for Public Administration, University of Queensland, 2000, p. 49.

¹⁸⁴ Anderson, J. (2004), The politics of Indigenous knowledge: Australia’s proposed Communal Moral Rights Bill. *UNSW Law Journal*, v.27 no.3, pp.585-604.

¹⁸⁵ Dawes, K. “Re-Appropriating cultural Appropriation”, fuse magazine. Vol. 16 No. 5&6, 1993 p.8

¹⁸⁶ Article 27, UN Declaration on the Rights of Indigenous peoples, www.un.org/esa/socdev/unpfii/en/drip.html, accessed December 15, 2009. p.1

structure, and herein lies the reality that indigenous people are in no way gaining a significant power base in these organizations.

By reflecting on culture, Aboriginal people become mediators of this new model, who then impose rhetorical assumptions and definitions of government and the international community upon Aboriginal communities.¹⁸⁷ Creating an assumption based on ownership, empowerment and self-determination and It is empowerment and culture that play a central role in determining how the declaration is implemented, Aboriginal people can be seen as subjects under colonial rule.¹⁸⁸ According to the declaration, it is the responsibility of the states to provide specific policies, which then allows for Indigenous peoples to contribute their own ideas.

Under Article 27, States shall establish and implement, in conjunction with indigenous peoples concerned, a fair; independent, impartial, open and transparent process, giving due recognition to Indigenous peoples laws, traditions, customs and land tenure systems.¹⁸⁹

The rule of law is made clear in Article 46 (3) under who creates this right, and who's culture is being heard

“The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good-faith.”¹⁹⁰

Instead of being supported and heard, Aboriginal people like other groups that do not match up to liberal standards are only being given “support” and “rights” to participate in mainstream political process, processes which have been subject to the same accountability and standards.¹⁹¹ In order for the rights to be implanted in Australia, they need to be in line with democracy; meaning, aboriginal culture cannot be fully realized. “Aboriginal customs

¹⁸⁷ Murphy, L. Who's Afraid of the Dark? Australia's Administration in Aboriginal Affairs, dissertation to the Centre for Public Administration, University of Queensland, 2000, p. 9.

¹⁸⁸ Batty, p. “Private politics, Public strategies: White Advisers and their Aboriginal subjects.” *Oceania* 75, 2005 p.11.

¹⁸⁹ Article 27, UN Declaration on the Rights of Indigenous peoples, www.un.org/esa/socdev/unpfii/en/drip.html, accessed December 15, 2009. p.1 (finish off reference)

¹⁹⁰ Article 27, UN Declaration on the Rights of Indigenous peoples, www.un.org/esa/socdev/unpfii/en/drip.html, accessed December 15, 2009. p.1 (finish off reference)

¹⁹¹ Anthony, T. Aboriginal self-determination after ATSIC: re-appropriation of the “original position”, *Polemic*, Volume 14, issue 1, p.5.

and laws are instead re-defined and made appropriate to fit within English laws and “civility.”¹⁹² When aboriginal/indigenous culture is recognized it’s always in terms of democracy.¹⁹³

As mentioned beforehand, laws and institutions devised for the best interest of Indigenous people have continued to fail. Examples of ATSIC; Native Title and SRA’s have all stated to be moving in the direction of empowering indigenous Australians, but instead Aboriginal people are still grossly over-represented in a system that continues to undermine them.¹⁹⁴ Like the ILO 169, it is too early to question what the status of its adoption is for Australia. One factor that cannot be put on hold is the dire position Aboriginal people have in the dealing of their own Affairs.

At this stage Australia's domestic law and sovereignty play a large part for the UNDRIP, to be applied domestically. Ultimately, domestic law protects Australia in areas of Land, Autonomy and culture. From my previous analysis in chapter 2 and 3 the history of Australia's treatment of indigenous peoples in this regard have been brought to the attention of the HRC. Despite this factor, reasons of sovereignty have been used to apply Australia's domestic law over that which is hard international law. It is for this reason that it is questionable whether or not the UNDRIP will have much affect on the position in which they face today.

So far the over-lapping cultures and the rule of law, create barriers for Indigenous people to acquire empowerment. At this stage the need for respect and understanding of indigenous culture and their history needs to be understood, both by the wider public and the Australian Government. A factor which needs to be taken into account when implementing the UNDRIP

¹⁹² Buchan, B. (2002) The empire of political thought: perceptions of Indigenous government in Australia. Paper presented to the Jubilee Conference of the Australian Political Studies Association Australian National University, p2.

¹⁹³ Parekh, B, Liberal Imperialism, Natives, Muslims, and others: Rethinking Multiculturalism: Cultural Diversity and Political Theory, political theory, vol. 30, No.5, October 2002 p738.

¹⁹⁴ Deveau, M, (2003) A deliberative approach to conflicts of culture. Political Theory, Vol.31. no.6 December 2003 pp.780-807.

in Australia, and to further recognize the efforts to “close the gap” of indigenous over-representation¹⁹⁵

In saying this, one may ask, what is meant by Indigenous self-determination? I cannot answer this question myself, as I am not an Aboriginal Australian. Instead I conclude this thesis with words from Aboriginal woman Naomi Fisher.

“Without aboriginal input (...) we are talked about, talked at, but never spoken with.”¹⁹⁶

¹⁹⁵ Jayasuriya, L (2002) Understanding Australian Racism. Australian Universities Review, vol.45 no.1, p.40-44

¹⁹⁶ Fisher, N. (2008), Out of Context: The liberalisation and Appropriation of “Customary” Law as assimilatory Practise. ACRAWSA e-journal, Vol. 4, No. 2, p 5

Annexes

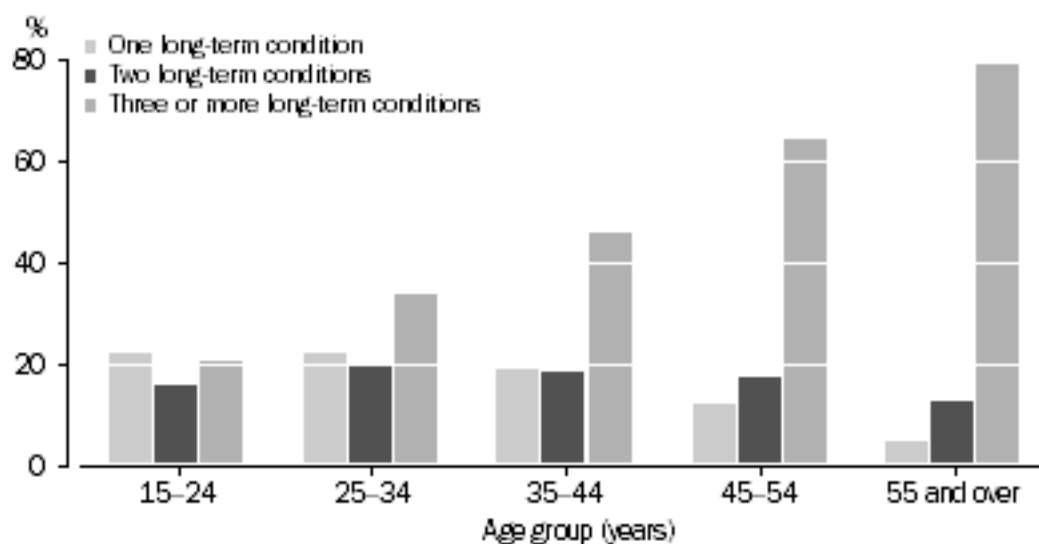
6.1 WA MANDATORY SENTENCING AND BURGLARY

Age and Sex	Race	Number	% of total that age and sex
Male Juveniles	Indigenous	1 258	58%
	Non-Indigenous	920	42%
Male Adults	Indigenous	43	30.5%
	Non-Indigenous	98	69.5%
Female Juveniles	Indigenous	160	66.6%
	Non-Indigenous	80	33.3%
Female Adults	Indigenous	9	9%
	Non-Indigenous	4	4%

Source: Crime Research Centre at the University of WA. Note that only about 4% of WA minors are Indigenous, HRC (2006), Australia's Human Rights Record Reviewed by the UN Human Rights Committee, retrieved from:

http://www.hreoc.gov.au/human_rights/un_committee/index.html#mandatory_sentencing

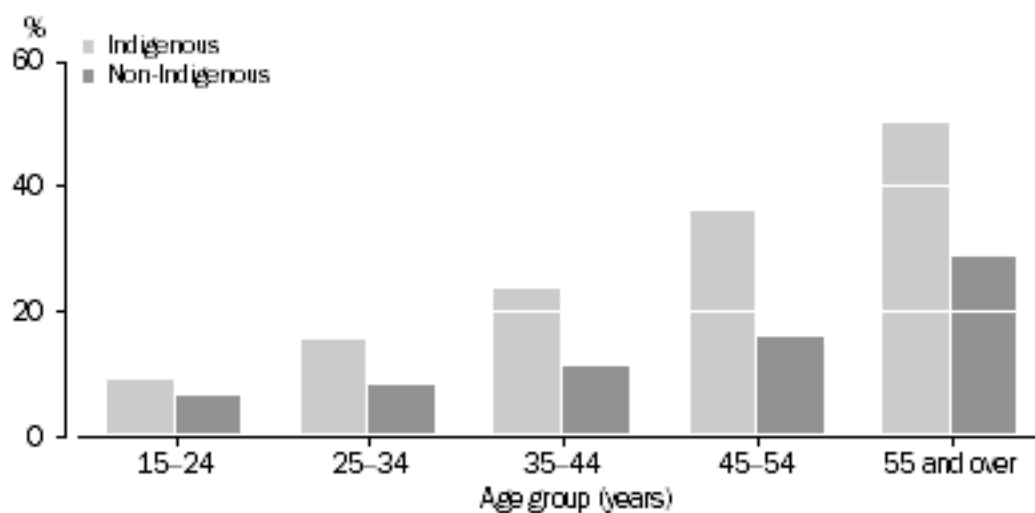
6.2 Number of long-term health conditions, Indigenous persons - 2004-05¹⁹⁷



Source: National Aboriginal and Torres Strait Islander Health Survey 2004-05

¹⁹⁷ Australian Bureau of Statistics (2006). 4715.0 - National Aboriginal and Torres Strait Islander Health Survey, 2004-05, retrieved, May 4th 2010, from <http://www.abs.gov.au/AUSSTATS/abs@.nsf/ProductsbyCatalogue/C36E019CD56EDE1FCA256C76007A9D36?OpenDocument>

6.2.1 Fair or poor self-assessed health, by Indigenous status - 2004-05¹⁹⁸



Source: National Aboriginal and Torres Strait Islander Health Survey 2004-05
National Health Survey 2004-05

¹⁹⁸ Australian Bureau of Statistics (2006). 4715.0 - National Aboriginal and Torres Strait Islander Health Survey, 2004-05, retrieved, May 4th 2010, from <http://www.abs.gov.au/AUSSTATS/abs@.nsf/ProductsbyCatalogue/C36E019CD56EDE1FCA256C76007A9D36?OpenDocument>

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